Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NORMAN C. HARTSEL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

N. STEVENS NEWCOMER *
ATTORNEY AT LAW
421 N. MICHIGAN STREET
TOLEDO, OH 43624
(419) 255-1222

Counsel for Petitioner

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in concluding that the Jeep Corporation, UAW Local 17, Employees Charity Fund, an organization concluded to be a public charity organized and operated under 26 U.S.C. § 501(c)(3), was also an asset of a labor organization within the meaning of 29 U.S.C. § 501(c), by failing to strictly construe definitional criminal statutes and denying defendant his right to Due Process pursuant to the Fifth Amendment to the Constitution of the United States of America.

2. Whether the Court of Appeals erred in holding that the District Court Judge was not required to recuse himself by reason of the provisions of 28 U.S.C. § 455 after the defendant waived his right to a trial by jury and a bench trial was conducted by the same judge who, prior to the commencement of defendant's trial, had accepted an alleged co-conspirator's plea, reviewed his presentence investigation and report that defendant now believes contained statements and/or allegations of evidentiary facts which were subsequently disputed by defendant and might reasonably call into question the judge's impartiality; and, previously sentenced co-conspirator Ronald Conrad, for the same crimes for which defendant was indicted.

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner, Norman C. Hartsel is an individual and President of Norman C. Hartsel Co. L.P.A., an Ohio Legal Professional Association.

Respondent

Respondent is the United States of America.

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ARGUMENT 1

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Petitioner, Norman C. Hartsel, respectfully prays that a Writ of Certiorari issue to review a final judgment and order of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit was decided and filed on December 16, 1999, and was recommended for full-text publication, United States of America, Plaintiff-Appellee, v. Norman C. Hartsel, Defendant-Appellant, Case No. 98-3639; Electronic Citation; 1999 FED App. 0417P (6th Cir); File Name: 99a0417p.06 (Appendix A). The Trial Court's unpublished opinion and order following bench trial finding defendant guilty of a violation of Title 18 U.S.C. § 1341 (reversed upon Appeal) and 18 U.S.C. § 2 and 29 U.S.C. § 501(c) was filed on January 23, 1998 (Appendix B). The Trial Court's order denying defendant's motions for a judgment of acquittal or in the alternative for a new trial were entered on May 6, 1998 (Appendix C).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on December 16, 1999. (App. A at 14).[1] This Petition for Writ of Certiorari is filed within 90 days of the United States Court of Appeals Opinion reversing in part, and upholding in part, the decision of the United States Federal District Court. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

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[1] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition relates to the Fifth Amendment to the Constitution of the United States of America; the provisions of 26 U.S.C. § 501(c)(3) and the interpretive regulations promulgated thereunder ("Internal Revenue Code"); 29 U.S.C. § 501(c) and the interpretive regulations adopted thereunder ("Labor Management Reporting and Disclosure Act"); and 28 U.S.C. § 455.

STATEMENT OF THE CASE

The defendant was indicted for violating the provisions of 18 U.S.C. § 1341, Mail Fraud and 18 U.S.C. § 2, Aiding and Abetting Ronald Conrad ("Conrad"), who at all relevant times was Chairman of United Automakers ("UAW"), Local 12, in the embezzlement of assets of a labor organization in violation of the provisions of 29 U.S.C. § 501(c).

Conrad, without being indicted, entered a plea agreement in which he admitted to embezzling assets from the Jeep Corporation, UAW Local 12 Employees Charity Fund ("Jeep Charity"). This plea was accepted by Senior Judge, John W. Potter, who, following receipt and review of a presentencing investigation report prepared by a Sentencing Guideline Specialist and after in camera meetings with counsel for Conrad and the same Assistant United States Attorney who prosecuted defendant, sentenced Conrad to a lesser sentence than that imposed upon defendant.

Subsequent to the entering of Conrad's sentence, defendant informed the Court that he would like to waive his constitutional right to trial by jury. Thereafter, on January 13, 1998, defendant, who acted as his own counsel, appeared

before the Court and after a series of cautions by the District Judge who sentenced Conrad, signed a waiver prepared by the Court. At no time did the judge who presided at the bench trial inform the defendant that he had by virtue of reviewing the presentence investigation and report, knowledge of evidentiary facts which would be disputed by defendant at trial.

Following sentencing, counsel for defendant filed a timely appeal to the Sixth Circuit Court of Appeals which challenged the Court's legal interpretations of the provisions of 18 U.S.C. § 1341 and 29 U.S.C. § 501(c), as they related to the facts and circumstances of the case. Additionally, defendant argued that the District Court Judge was required to recuse himself because of the express provisions 28 U.S.C. § 455.

The Sixth Circuit Court of Appeals found that the government did not establish all elements necessary to sustain a conviction for mail fraud, and reversed the District Court Judge's finding of guilty with respect to 18 U.S.C. § 1341. However, the reviewing Court also held that the judge who had presided over defendant's bench trial was not required to recuse himself and affirmed the Trial Judge's decision that the Jeep Charity was an asset of a labor organization and that the defendant had aided and abetted Conrad in embezzling money from the Jeep Charity. It is from these holdings that defendant seeks a Writ of Certiorari to review the Sixth Circuit Court of Appeals final judgment and order.

FACTS

United Automakers Local 12 (hereinafter "Local 12") represents production employees of The Chrysler Corporation's plants in Toledo, Ohio. At all relevant times,

Conrad served as Chairman of Local 12 and by virtue of such position was a member of the Board of Trustees of the Jeep Charity which was an entity organized and operating under its separate charter. At some unknown time, the Jeep Charity was exempted from the payment of Federal Income Taxes by being classified and operated as a public charity pursuant to the provisions of 26 U.S.C. § 501(c)(3). At all relevant times, UAW members of Local 12 had a fixed percentage of their earnings withheld from their paychecks by the Chrysler Corporation which deposited the collected funds into a bank account at National City Bank. This bank account was maintained by Chrysler Corporation executives who deposited monies as employee charitable contributions to the Jeep Charity.

While there was no evidence at trial that anyone other then union members of Local 12 made charitable contributions to the Jeep Charity, as an exempt public charity, any person could have made contributions to the Jeep Charity to permit the furtherance of its charitable purposes.

Chrysler Corporation maintained the books and records of the Jeep Charity and through its employees (none of whom were members of Local 12) caused required annual reports to be filed with the Internal Revenue Service to permit the Jeep Charity to be continued to be recognized as a public charity and, therefore, exempt from the payment of income taxes on its receipts and earnings. Although the Jeep Charity was a public charity, it was not, in and of itself, an operating charity, but rather was a feeder organization, much like the United Way. Periodically, the Board of Trustees of the Jeep Charity would meet to determine which area public charities should be recipients of distributions from the Jeep Charity and the amount of such distributions. Once determined, the Chrysler Corporation would be advised of the identity of these

charitable organizations and it would, through a non-local 12 employee, cause a check or checks to be prepared on the checkbook which it, not Local 12, possessed and controlled. These checks were then delivered to the Board of Trustees for signature and counter-signature. Conrad, as UAW Local 12 Chairman, was authorized to sign these checks which were typically also counter-signed by another member of the Board of Trustees of the Jeep Charity.

At all relevant times, the defendant was a practicing attorney whose clients included Southwyck Jeep Eagle, a franchisee of the Chrysler Corporation, and the car dealer's sole shareholder, Dannie C. Johnson ("Johnson"). In 1991 Johnson discussed with the Defendant the formation of a public charity which would engage in philanthropy in Northwest Ohio. Johnson believed that his many business contacts would allow him to successfully solicit charitable contributions to provide operating funds for such charity to permit the conduct of its purpose. Johnson specifically believed that he could secure significant donations from the Jeep Charity, not only because of his personal friendship with Conrad, but also, other union officials whom he had come to know after his shop employees elected to have Local 12 be its bargaining agent.

In January 1992, after failing to dissuade Johnson about the costs of establishing, operating and maintaining status as an exempt public charity, defendant, at the request of Johnson, formed Stamp Out Hunger of Northwest Ohio ("SOH"). The defendant did no further work for SOH until April, 1992, when Johnson delivered to defendant a check from the Jeep Charity in the amount of $10,000.00. Immediately thereafter, defendant, at the request of Johnson, established an account with Mid American Bank in the name of SOH and completed the preparation of significant other

documents necessary to the establishment of SOH and to permit it to obtain exempt status under 26 U.S.C. § 501(c)(3) as a public charity. Following completion of this work, the defendant's professional corporation received payment for its services in two billings approved by Johnson.

In the ten months following its initial establishment, SOH received four additional checks from the Jeep Charity in varying amounts. Each was deposited to the SOH bank account from which funds were periodically disbursed for operating expenses and charitable purposes. Throughout the relevant period of April, 1992 to February, 1993, defendant had no discussions at any time with Conrad, nor with any other Trustee of the Jeep Charity. In May, 1993, when Defendant learned form the public media that a task force of various federal departments was investigating the operations of Local 12 and its officers, defendant suspended all work for SOH because it was reported that the Jeep Charity was a subject of the investigation. Prior to being contacted by any government investigator, defendant offered to the investigating entities all records and files of SOH.

It was subsequently alleged that Johnson (who was given full transactional immunity) and Conrad had developed a scheme to illegally obtain funds from the Jeep Charity for their own personal purposes. It was contended that on three of the five occasions when Conrad personally delivered Jeep Charity checks to Johnson, Conrad asked to receive back certain amounts for his personal use.

The defendant became implicated in the scheme of embezzlement because on two occasions, he acknowledged he had made personal loans to Johnson. This was not unusual since Johnson had on previous occasions borrowed money from the defendant. Defendant was personally aware of

Johnson's dire financial straits and gave Johnson $4,000.00 in May, 1992 and $5,000.00 in February, 1993. As part of his immunity agreement, Johnson agreed to testify that the defendant was aware that these funds were being returned to Conrad as a kick-back and were not loans as consistently contended by defendant and as supported by defendant's contemporaneous records.

Following the completion of the FBI investigation, defendant was indicted for mail fraud on the theory that the mere receipt of bank account statements for SOH at his business office constituted the criminal offense of the use of the mails for the purpose of executing a scheme to defraud. Defendant was also indicted for aiding and abetting Conrad in the embezzlement of union funds. Conrad was also charged with the embezzlement of union funds to which he entered a guilty plea. Defendant waived his right to jury trial and chose to represent himself despite lacking any prior experience in criminal proceedings. Johnson testified at trial that he paid Conrad kick-backs and that the defendant was aware of the scheme. The defendant vehemently disputed any knowledge of Johnson's dealings with Conrad or any knowledge of any scheme. Conrad testified that although he knew defendant from two prior casual encounters, he never discussed any aspect of SOH with defendant. When asked, Conrad stated that the only information he had about defendant's involvement with SOH were statements made to him by Johnson.

On the day preceding the bench trial, defendant was furnished by the prosecutor with a stack of documents which included statements made by Conrad to the government, but did not include Conrad's presentence and investigation report. These documents disclosed among other things that Conrad admitted to a scheme of extortion in which he used his

influence as Jeep Chairman to direct Local 12 employees to purchase Jeep vehicles from Johnson's car dealership in exchange for cash and other personal economic enhancements given to him by Johnson. Conrad also stated therein and at trial that Johnson had dire financial needs to support drug and gambling habits and that he did not care nor did he personally know from where funds paid to him originated.

Notwithstanding the fact that Conrad admitted to a plan to extort money and other personal favors from Johnson and acknowledged receipt of payments well beyond alleged receipts from defendant; the uniform testimony of community business leaders that Johnson did not have a reputation for truth and veracity; the testimony of defendant supported by contemporaneous records and independent testimony, the District Court found defendant guilty of both crimes. Prior to sentencing, the Court denied defendant's Motion for Judgement of Acquittal, or alternatively, for a new trial. Defendant was sentenced pursuant to the sentencing guidelines to 15 months in prison for each offense, to be served concurrently, two years supervised release, a fine, restitution and a special penalty assessment.

ARGUMENT FOR GRANTING WRIT

The Court of Appeals erroneously determined that the bank account of the Jeep Charity was an asset of a "labor organization" as that term is specifically defined and used in the LMRDA (29 U.S.C. §§ 402 and 501(c). The UAW Local 12 charity was, however, averred and found to be a public charity organized and operating under 26 U.S.C. § 501(c)(3). On the basis of that finding alone, the Jeep Charity could not by definition be an asset of UAW Local 12 since the money contained in that Jeep Charity was the property of that

organization and was held in trust by the employer, Chrysler Corporation, for the benefit of its contributors and distributees and not the union or its members. In no event, could any party with an interest in the fund – whether the fund itself, the employer or the employee-contributors – qualify as a "labor organization" under the statute. In the complete absence of any evidence showing that the Jeep Charity itself was of a "labor organization" a judgment of acquittal should have been entered as to the indictment's second count, as well.

Further, defendant contends that the provisions of 28 U.S.C. § 455, as applied to the particular factual circumstances of this case, required the Judge to recuse himself because he had personal knowledge (through presentence reports and the like) to a substantial amount of ex-party information about the offense; about Mr. Conrad; and, about Conrad and Johnson's credibility. 28 U.S.C. § 455(a) requires a judge to recuse himself in any proceeding in which his impartiality might reasonably be questioned. Additionally, or alternatively, 28 U.S.C. § 455(b)(1), requires recusal if the judge has "personal knowledge of disputed evidentiary facts" at issue in the proceeding. If a ground for recusal exists, the judge is obligated to recuse himself whether or not any party makes a motion to that effect without defendant being required to establish personal bias.

Both arguments demonstrate a denial of due process as guaranteed by the Fifth Amendment to the Constitution of the United States of America.

ARGUMENT 1

THE COURT OF APPEALS, IN CONCLUDING THAT THE JEEP CORPORATION, UAW LOCAL 12, EMPLOYEES CHARITY FUND, WAS AN ASSET OF A "LABOR ORGANIZATION" WITHIN THE MEANING OF 29 U.S.C. § 501(C), VIOLATED THE TENET THAT ALL CRIMINAL STATUTES SHALL BE STRICTLY CONSTRUED THEREFORE DENYING THE DEFENDANT OF HIS RIGHT TO DUE PROCESS PURSUANT TO THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

Count 2 of the indictment charged defendant with aiding and abetting Conrad's theft of all funds which were given to SOH (and not just the amount claimed to have been kicked back to Conrad). According to the indictment, Conrad's conduct violated 29 U.S.C. § 501(c), which provides:

> *Any person who* embezzles, *steals,* or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of *the moneys, funds,* securities, *property, or other assets of a labor organization of which he is an officer,* or by which he is employed, directly or indirectly, *shall be fined* not more than $10,000 *or imprisoned* for not more than five years, or both. [Emphasis added.]

As the statute makes clear, an essential element of this crime is that the stolen "moneys, funds, . . . property, or other assets" be those "of a labor organization". Whatever else the Government may have shown about the moneys and where they went, it utterly failed to prove this required element. And without such proof, the Government's case as to the second count fails as a matter of law, and the conviction on that count must be reversed.

In its opening statement, the Government announced its theory regarding the "labor organization" element of the crime. There, the prosecutor described the Jeep Charity as a tax-exempt organization under § 501(c)(3) of the Internal Revenue Code. (Tr. 1:15). And the theory of the Government's case was that the defendant participated in the theft of moneys from that Fund; that is, that The Fund was the "labor organization" required by the statute.

Of course, such a theory is doomed. Certainly, if the Fund *was* an independent entity, as the Government described it in opening statement, then the allegedly stolen money was not the money of a "labor organization". Under the LMRDA, a "labor organization" is an entity "which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment." 29 U.S.C. § 402(I). As a free-standing, tax-deductible, public charitable organization recognized under the Internal Revenue Code, the Fund existed for none of those purposes. Rather, its sole purpose was the aiding of charitable works; indeed, its funds could be used for no other purpose without the loss of its exempt status. As an entity, therefore, the Fund could not be a "labor organization". Thus, under the theory the prosecutor announced at the outset of trial, the case against the defendant necessarily failed.

At some point, the Government apparently recognized this fatal defect, because it entirely abandoned this theory. But, alas, in abandoning its flawed theory, the Government wholly failed to replace it with any alternative theory. And, likewise, it failed to adduce any meaningful evidence about the Fund: what kind of organization it was or what was its legal status or identity. It did not prove that the Fund was a "labor organization" within the meaning of the statute.

In as much as the Government's case contained no evidence about the nature of the Fund, as a labor organization or anything else, the trial court erroneously failed to grant a motion for judgment of acquittal at the close of the Government's case and, the Court of Appeals, by expanding the definition of "labor organization" or "asset of a labor organization", took it upon itself to expand a definition which should be strictly construed in favor of the defendant, thus denying him his right to due process under the Fifth Amendment to the Constitution of the United States of America.

In the case of *U.S. v. Seidman*, 156 F.3d 542 (4th Cir. 1998), the Court stated:

> . . . "As a criminal statute, § 501(c) must be strictly construed." *United States v. Hart,* 417 F.Supp. 1314, 1321 (S.D.Iowa 1976) (citing *United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislative, not in the judicial

> department.")). *See also United States v. Belt*, 574 F.2d 1234, 1237-38 (5th Cir. 1978) ("We have interpreted § 501(c) as a remedial statute creating a new federal crime to be given its broadest construction to reach the ills it was designed to counteract. Thus the duty imposed by the statute may be more stringent than that imposed by the common law if necessary to fulfill the statutory purpose. Nevertheless, because the statute is a criminal one, we must be wary of a too-broad construction that goes beyond congressional intent or power.") (citations omitted). (*Seidman, supra* at p. 559).

In *United States vs. Ferrara*, 451 F.2d 91 (1971), the defendant and others were convicted of violating the labor management reporting and disclosure act ("LMRDA"). In considering the retirement fund and whether or not the money in the retirement fund was really union money, the Court stated:

> The trial court reasoned and the Government argues, that, if the Fund were not treated as Union money for the purposes of 29 U.S.C. § 503(a), the Landrum-Griffin Act would have a hole in it "so big that a fleet of abuses [sic] can go in through it abreast." But we cannot rewrite the statute for Congress.
>
> [1] This is a criminal statute we are construing, and we have been admonished not to "enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." *Morissette v.*

United States, 342 U.S. 246, 263, 72 S.Ct. 240, 250, 96 L.Ed. 288 (1952).

See also Williams v. International Typographical Union, AFL-CIO, et. al, 423 F.2d 1295, (10th Cir. 1970).

It is clear that by broadly interpreting the definition of "labor organization" and "asset" of a labor organization, the Court of Appeals has judicially broadened a criminal statute, and in doing so, has failed to strictly construe a criminal statute. This denies the defendant to due process pursuant to the Fifth Amendment to the Constitution of the United States of America.

Additionally, the Court's reliance upon *United States v. LaBarbara*, 129 F.3d 81 (2nd Cir. 1997), to support the defendant's conviction is fatally flawed. The Jeep Fund is a public charity exempt from income tax under 26 U.S.C. § 501(c)(3) where assets must be used solely for public purposes. The building corporation in *LaBarbara* on the other hand was not exempt under 26 U.S.C. § 501(c)(3), but rather under a subsection which permitted and/or required the assets to be used for the exclusive use of its members. As such, the Building Corporation was not a public charity.

ARGUMENT 2

THE COURT OF APPEALS ERRED IN HOLDING THAT THE DISTRICT COURT JUDGE WAS NOT REQUIRED TO RECUSE HIMSELF PURSUANT TO THE PROVISIONS OF 28 U.S.C. § 455.

The defendant, as been noted previously, waived a trial by jury and consented to a bench trial. Although he was

a lawyer, he had not practiced any criminal law and was not cognizant, until the completion of his pre-investigation process that the trial judge had factual information concerning Conrad, not only from the presentence investigation and report prepared by a Guideline Specialist prior to Conrad's sentencing, but also from prior meetings with the same Assistant United States Attorney who prosecuted defendant and Conrad's Defense Counsel.

Under 28 U.S.C. § 455, a judge is under "an affirmative, self-enforcing obligation to recuse himself *sua sponte* whenever proper grounds exist." *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989). The statute "imposes . . . no duty on the parties to seek disqualification, nor any time limits within disqualification must be sought". *Potashnick v. Port City Construction Company*, 609 F.2d 1101, 1115 (5th Cir. 1980), *cert. denied*, 449 US 820.

Further, recusal is required under the statute (among other reasons) whenever the judge's impartiality might reasonably be questioned, 28 U.S.C. § 455(a), *or* whenever the judge has "personal knowledge of disputed evidentiary facts" at issue in the proceedings, *Id.* § 455(b)(1). The latter ground is not waiveable by the parties. The litmus test for the first ground is whether a "reasonable [person] knowing all the circumstances would harbor doubts concerning the judge's impartiality." *United States v. Sciarra*, 851 F.2d 621, 634 (3rd Cir. 1988).

"The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). Neither actual partiality, nor knowledge of the disqualifying circumstances on the part of the Judge during the effected

proceeding is a pre-requisite to disqualification under the section. The duty of recusal applies equally before, during, and after a judicial proceeding, whenever disqualifying circumstances become known to the Judge. *Kelly, supra*, 888 F.2d at 744.

The credibility of the witnesses in this case was crucial and became, for the trier-of-fact, a question of whether Johnson was lying or defendant was lying about the circumstances surrounding the disbursement of the charitable funds. Certainly several facts contained in Conrad's presentence investigation and report, were expected to be in dispute including all statements of Johnson who gave inconsistent and contrary statements to investigators and at trial. It would be difficult, if not impossible, for a trier-of-fact, and in this case the district judge, to ignore everything contained in Conrad's presentence investigation and report.

Therefore, the trial judge in this case should have granted defendant's motion for a new trial, since it was most reasonable to be concerned that the judge's prior involvement with proceedings involving Conrad exposed the judge to disputed evidentiary facts, the mere knowledge of which might call into question his complete impartiality. The Court of Appeals, in failing to recognize the fact that the trial court judge should have recused himself, violated the defendant's right to a fair and impartial trial, all in violation of his right to due process under the Fifth Amendment to the Constitution of the United States of America.

CONCLUSION

The Court of Appeals' decision in this case is inconsistent with the dictates that criminal statutes must be strictly construed and not expanded to encompass situations

where the Court believes that the statute itself does not sufficiently protect individuals or organizations. Such judicial activism and unrestricted discretion limited by proper statutory construction or the facts is not consistent with the due process requirements of the Fifth Amendment to the Constitution of the United States of America and requires that this matter be heard by the Supreme Court of the United States to prevent further expansion of particular criminal statutes not contemplated by legislature or permitted by the Constitution of the United States of America.

Further, this Petition for Writ of Certiorari should also be granted in as much as the Court of Appeals' failed to recognize that the particular circumstances involving a trial judge sitting as a trier-of-fact on a case in which specific facts has already been garnered from information in a related case, required that the Judge recuse himself in order to comply with the dictates of 28 U.S.C. § 455.

Wherefore, Petitioner, Norman C. Hartsel respectfully prays that his petition for Writ of Certiorari be granted.

Respectfully submitted,

/s/_____
N. STEVENS NEWCOMER, ESQ.
Counsel of Record

N. Stevens Newcomer, Esq.
421 N. Michigan Street
Toledo, Ohio 43624
(419) 255-1222

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed December 16, 1999]

No. 98-3639

United States of America, *Plaintiff-Appellee*,	)
v.	)
Norman C. Hartsel, *Defendant-Appellant*.	)

Appeal from the United States District Court
for the Northern District of Ohio at Toledo.

No. 97-00717--John W. Potter, District Judge.
Submitted: September 21, 1999

Before: BOGGS and DAUGHTREY, Circuit Judges;
McKINLEY,* District Judge.

* The Honorable Joseph H. McKinley, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

OPINION

McKINLEY, District Judge. The Defendant, Norman Hartsel, was convicted in the United States District Court for the Northern District of Ohio of mail fraud, 28 U.S.C. § 1341, and aiding and abetting the embezzlement of funds of a labor organization, 29 U.S.C. §501(c). On appeal, Hartsel asserts that the district court erred in finding the receipt of mailed bank statements constituted a use of the mails under the mail fraud statute, and in concluding the embezzled funds were the funds of a labor organization. Hartsel also contends that the district court erred in denying his motion for recusal. Because we find that the receipt of the bank statements failed to satisfy the use of the mail requirement under the facts of this case, we must reverse the mail fraud conviction. However, in all other respects, we affirm the decision of the District Court.

Facts

United Auto Workers Local 12 (Local 12) represents Chrysler Corporation employees at Chrysler's Toledo, Ohio plant. Ronald Conrad (Conrad) served as the chairman of Local 12. Local 12 established a charitable fund in its constitution known as the Jeep Corporation, UAW Local 12 Employee's Charity Fund (Jeep Charity Fund). The employees represented by Local 12 contribute to this charity by authorizing deductions directly from their payroll checks. The Jeep Charity Fund qualified for tax-exempt status under 26 U.S.C. § 501(c)(3) of the Internal Revenue Code. While the union officers did not participate in preparing or signing the annual reports, tax returns or other required filings, the union completely controlled disbursements to the charities of

its choice. Conrad authorized and signed most of the checks from the fund. Local 12 kept records of the fund's activity at its offices.

The Defendant, Norman Hartsel, was a practicing attorney in Perrysburg, Ohio. In his legal practice, Hartsel represented Dannie Johnson (Johnson), who owned a local Jeep dealership. Johnson sat on the boards of several local charities, but he became disenchanted with this position. Johnson asked Hartsel to establish a charity which he could direct and control. Thereafter, Hartsel established Stamp Out Hunger of Northwest Ohio (SOH) in January of 1992.

Conrad was approached by Johnson seeking a contribution for SOH from the Jeep Charity Fund. In April of 1992, SOH received the first of a series of checks from the Jeep Charity Fund. This check was dated April 7, 1992, in the amount of $10,000. Hartsel used these funds to establish a bank account at Mid-American Bank in the name of SOH. He was the only authorized signatory on the account. Furthermore, Hartsel directed the bank to mail all monthly statements, including the canceled checks, and any other information relative to the account to the address of his law firm. Hartsel received these statements and filed them at his law offices. The FBI discovered the statements there during its search of his business.

After the deposit of this first check, the money quickly changed hands. Hartsel wrote checks to his law firm for $2,138.50 on April 17 and $3500 on April 24. On April 22,

he wrote another check to TB3 Properties (TB3) for $4004.[1] Additionally, the government traced a September 21 payment from SOH to Hartsel's law firm to this initial deposit. In June of 1992, the Jeep Charity Fund issued another check for $4500. Hartsel then wrote a check in this amount to TB3. In November and December of 1992, SOH received checks from the Jeep Charity Fund for $2000 and $500 respectively. Again, this money was paid out to TB3. In February of 1993, the Jeep Charity Fund provided a final check in the amount of $10,000. Of this amount, $7000 went to Hartsel's law firm and $2000 to TB3. Once this money was deposited into his various accounts, Hartsel used it to pay debts of his law firm or withdrew it for his personal use. Hartsel loaned some of this money to Johnson as a personal loan. Hartsel claims no knowledge that Johnson returned the money to Conrad as a kickback.

Following an FBI investigation, Hartsel was indicted for mail fraud and aiding and abetting the embezzlement of union funds. Conrad was also indicted for embezzlement from union funds and plead guilty. Hartsel waived his right to a jury trial and chose to represent himself despite lacking prior experience in the area of criminal law. Johnson testified at trial that he paid Conrad a kickback and that Hartsel knew of the scheme. Following the bench trial, the District Court found Hartsel guilty of both crimes. The District Court then

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[1] In addition to practicing law, Hartsel operated a real estate partnership with his wife known as TB3 Properties (TB3). TB3 primarily operated a self-storage business. Additionally, TB3 owned other real estate properties, some of which included office space.

denied the Defendant's Motion for Judgment of Acquittal and the Defendant's Motion for a New Trial. Hartsel received a sentence of 15 months for each offense, to be served concurrently, two years of supervised release, a fine, restitution, and a special penalty assessment. Hartsel appealed the denial of his post-verdict motion for judgment of acquittal or a new trial.

Standard of Review

Decisions denying a motion for judgment of acquittal are reviewed de novo to determine the sufficiency of the evidence. Drawing all inferences and credibility determinations in light most favorable to the prosecution and in support of the verdict, the Court must consider whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *United States v. Lee,* 991 F.2d 343, 347 (6th Cir. 1993); *United States v. Gibson,* 896 F.2d 206, 209 (6th Cir. 1990). The Court reviews decisions denying motions for a new trial and motions to recuse under the abuse of discretion standard. *Anchor v. O'Toole,* 94 F.3d 1014, 1021 (6th Cir. 1996); *Barclays/American Bus. Credit, Inc. v. Adams (In re Adams),* 31 F.3d 389, 396 (6th Cir. 1994), *cert. denied,* 513 U.S. 1111(1995).

Discussion

I. Mail Fraud

The Federal Mail Fraud Statute, 18 U.S.C. § 1341, makes it a criminal offense to use the mails for the "purpose of executing" any scheme to defraud or other fraudulent

activity.[2] To prove a claim under this statute, the government must show proof of the following three elements: (1) devising or intending to devise a scheme to defraud (or to perform specified fraudulent acts); (2) involving a use of the mails; and (3) for the purpose of executing the scheme or attempting to do so. *United States v. Frost,* 125 F.3d 346, 354 (6th Cir. 1997), *cert. denied,* 119 S.Ct. 40, 41 (1998). In *Schmuck v. United States*, 489 U.S. 705 (1989), the Court explained that the mail fraud statute was not designed "to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Id.* at 710 (quoting *Kann v. United States,* 323 U.S. 88 (1944)). "The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the

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[2] At the time of Hartsel's actions, 18 U.S.C. § 1341 read:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1000 or imprisoned not more than five years, or both.

time." *Id.* at 715. The mailing need not be an essential element of the scheme to defraud; it is sufficient if the use of the mail is "incident to an essential part of the scheme, or a step in the plot." *Id.* at 711 (internal quotations and citations omitted); *United States v. Montgomery,* 980 F.2d 388, 393 (6th Cir. 1992). However, the use of the mail must be in furtherance of the scheme to defraud. *United States v. Brown,* 147 F.3d 477, 483 (6th Cir.), *cert. denied,* 119 S.Ct. 270 (1998). This Court has explained that "the mailings need not be essential to the scheme, but must be sufficiently closely related to [the] scheme. In other words, for a mailing to be in furtherance of a scheme, the scheme's completion or the prevention of its detection must have depended in some way on the charged mailing." *United States v. Henson,* 848 F.2d 1374, 1378 (6th Cir. 1988), *cert. denied,* 488 U.S. 1005 (1989) (internal quotations and citations omitted); *accord Frost,* 125 F.3d at 358.

The District Court found SOH's bank account was an essential part of the scheme to defraud, and that the mailing of the bank statements was incident to maintaining that account, and thus, in furtherance of the Defendant's scheme. Additionally, the District Court held the statements permitted the Defendant to monitor the account and to withdraw the balance. Hartsel contends that the bank statements were not used in furtherance of the scheme to defraud.[3] He maintains that the evidence shows only that the bank statements were received, opened, and filed. Hartsel argues in this appeal that the government must actually prove that he used the

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[3] The Defendant apparently does not dispute that a scheme to defraud existed.

statements, and not simply leave it for speculation that the statements could have been used in some way to further the scheme.

Several circuits have faced similar issues related to the mailing requirement of the mail fraud statute and the receipt of bank statements incident to a bank account used to further the scheme. *United States v. Lack,* 129 F.3d 403 (7th Cir. 1997); *United States v. Reed,* 47 F.3d 288 (8th Cir. 1995); *United States v. Walker,* 915 F.2d 1463 (10th Cir. 1990); *United States v. Knight,* 607 F.2d 1172 (5th Cir. 1979). In each of these cases, the courts required more than mere receipt of mailed bank statements incident to an essential bank account to establish the mailing requirement under the mail fraud statute. In each case, there was sufficient evidence to show that the bank statements were necessary to the success of the scheme or that they were used in some fashion to aid or further the scheme.

In *Lack,* the defendant engaged in a scheme to defraud his employer, Dairyland Power Cooperative. The defendant's job was to sell the company's used equipment. He would obtain checks from purchasers and deliver these to Dairyland. As a part of his scheme, he established a bank account in his own name doing business as Dairyland Power Conversion, a division of Midwest Computer. As a result of opening this account, the bank mailed regular monthly statements to him. When he sold an item of equipment, he would deposit the purchaser's check into his account, rather than sending it on to his employer. The defendant would then transfer the funds from this account to another account. Occasionally, the defendant would issue a bank check from this second account

to his employer with the name of the original purchaser of the equipment as the remitter.

The Seventh Circuit affirmed the district court's finding of a violation of the mail fraud statute. After finding the defendant engaged in a scheme to defraud, the court analyzed whether the government established the mailing requirement. The court held that the bank account was an essential part of the fraudulent scheme because the defendant needed it to launder money and "cloak Mr. Lack's fraudulent venture with an aura of legitimacy." *Lack,* 129 F.3d at 408. The court found that the bank account caused customers to believe they were dealing with Dairyland, and that the mailing of the account statements assured the bank that the account owner was a legitimate business. "[B]ecause the mailing of the bank statements was incident to the opening of that account, those mailings were 'in furtherance' of Mr. Lack's scheme." *Id.* at 409 (quoting *Schmuck v. United States,* 489 U.S. 705, 712 (1989)). Additionally, the court ruled that the bank statements directly aided the defendant in concealing his scheme by allowing him to carefully monitor the scheme's progress. *Id.* The court found that "[t]he bank statements aided Mr. Lack in this effort by serving as the accounting books of his operation; they allowed him to manage the flow between the two accounts and avoid overdrafting the first account." *Id.*

The Eighth Circuit similarly held that bank statements mailed to an accountant satisfied § 1341's mailing requirement. *United States v. Reed,* 47 F.3d 288, 291 (8th Cir. 1995). Here, an accountant and an attorney were indicted for mail fraud based on their scheme to steal money held in the attorney's client trust account. A jury found the

accountant guilty of mail fraud. On appeal, the accountant argued that the government failed to establish the mailing requirement. The evidence showed that the accountant and attorney deposited large sums of client money, sometimes without authorization, into the trust account. They both would then write checks on the account, frequently depleting the account to a nominal balance. Additionally, the accountant often carried loose checks. He would use these checks without contemporaneously recording the transaction in the register. However, during the course of this scheme, the trust account was overdrawn only once.

In summarizing the district court's finding, the court stated "the district court reasoned that the jury could have found that [the attorney and accountant] were able to maintain their fraudulent scheme without detection by relying in part on the bank statements to coordinate and fine-tune their withdrawals." *Id.* at 290. The court held the district court's finding that the bank statements were essential to the ongoing success of the scheme was supported by the evidence. *Id.* at 290-91. Analyzing *Schmuck,* the court ruled that a rational jury could have found the monthly mailing of the trust account bank statements was an essential part of the scheme. *Id.* at 291. While the bank statements played no direct role in duping the clients, the defendants needed them to ensure the account maintained a positive balance, which was essential to the continuation of the scheme. *Id.; see also United States v. Freitag,* 768 F.2d 240, 243-44 (8th Cir. 1985) (holding mailing requirement satisfied where bank statements allowed defendants to know and keep track of balances in accounts used for check kiting scheme).

We agree with the District Court's determination that the bank account was an essential part of the defendant's scheme and that the mailing of the bank statements was incident to the maintenance of that account. However, such a determination does not necessarily mandate the ultimate conclusion that the bank statements were used to aid or further the scheme. We agree with those circuits which have addressed this issue that there must be sufficient evidence to show that the bank statements were used in some way to aid or further the scheme before the mailing requirement is satisfied. As we have held in other circumstances "[t]he mailings . . . must serve the purpose of executing or furthering the accomplishment of the scheme." *United States v. Frost,* 125 F.3d 346, 358 (6th Cir. 1997), *cert. denied,* 119 S.Ct. 40, 41 (1998) (holding mailing of vouchers had no relationship to the fraudulent scheme).

To the extent that the Seventh Circuit decision in *Lack* suggests that the mailing requirement is satisfied simply by the mailing of bank statements incident to a bank account which is an essential part of a scheme, we respectfully disagree. However, we believe that a full reading of that opinion clearly shows that the court considered the defendant's use of the bank statements and how that use aided and furthered the scheme. The District Court's opinion in this case is similar. At one point, it states that "[t]he Mid-American account was an essential part of the scheme, and the mailing of the bank statements was incident to that account and were thus in furtherance of the defendant's scheme." Again, to the extent that it is argued that this is sufficient to satisfy the mailing requirement, we disagree. However, a full reading of the District Court's order denying the motion for acquittal reflects a finding that the Defendant used the

statements "to monitor the account and to withdraw the balances." Thus, we must review the evidence to determine if it is sufficient to show that the Defendant used the bank statements "to monitor the account and to withdraw the balances."

That review, however, fails to establish that the bank statements themselves served any useful step, purpose, or role in furthering the scheme. Unlike *Lack* and *Reed*, the record here fails to reveal how the statements served as a bookkeeping or accounting function. Hartsel did not carry and utilize loose checks, waiting until a later time to record the transactions. The evidence does not suggest Hartsel needed the bank statements to reconcile the account and ensure it maintained a positive balance during the period of the scheme. Most of the withdrawals occurred contemporaneously with the deposit of a check from the Jeep Charity Fund.

The government contends the evidence shows that at least on one occasion Hartsel "withdrew money from SOH [sic] account without a deposit, . . . lead[ing] to the reasonable inference found by Judge Potter that defendant monitored the bank statements to determine if it contained additional funds to embezzle." However, it is just as likely that Hartsel knew he could withdraw this amount based on the balance maintained in the checking account ledger. Because the evidence could not persuade any rational fact-finder beyond a reasonable doubt that Hartsel actually used the bank statements in furtherance of or as a step in his scheme to defraud the Jeep Charity Fund, the District Court's denial of the Motion for Judgment of Acquittal on the mail fraud count must be reversed.

II. *Embezzlement of Funds of a Labor Organization*

29 U.S.C. §501(c) criminalizes any embezzlement, theft, or conversion of money, funds, securities, property or other assets from a labor organization.[4] The District Court found that the Jeep Charity Fund was a fund of Local 12, and accordingly found Hartsel guilty of aiding and abetting the embezzlement of funds of a labor organization. On appeal, Hartsel maintains that the District Court erred in concluding that the Jeep Charity Fund was the fund of a labor organization. He argues that the government's characterization of the Jeep Charity Fund as a tax-exempt organization under 26 U.S.C. §501(c)(3) renders it a separate entity, and that, as a separate entity, the Jeep Charity Fund fails to satisfy the definition of a labor organization. Additionally, he asserts that the government's belated attempt to characterize the fund as an associate fund of the local union still fails to satisfy the requirement of 29 U.S.C. §501(c).

We agree with the District Court that the Jeep Charity Fund is the fund of a labor organization. Courts should interpret Section 501 broadly "to ensure that elected union

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[4] 29 U.S.C. 501(c) states:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

officials fulfill their responsibilities as fiduciaries to their members, guard union funds from predators, and keep intact all such funds except those expended in the legitimate operation of the union's business. The funds should be treated as trust funds belonging to the union's members." *United States v. Goad,* 490 F.2d 1158, 1162 (8th Cir.), *cert. denied,* 417 U.S. 945 (1974); *see also United States v. Ellis,* 493 F. Supp. 1092, 1097 (M.D. Tenn. 1979), *aff'd,* 617 F.2d 604 (6th Cir. 1980) (unpublished opinion).

The Second Circuit has held that assets of a not-for-profit building corporation controlled by a union comprise the assets of a labor organization under §501(c). *United States v. LaBarbara,* 129 F.3d 81 (2nd Cir. 1997). In *LaBarbara,* the defendant served as the principal officer of the local union. The union owned a corporation whose principal asset was the union headquarters. Without the approval of the union's trustees or the corporation, the defendant pledged the union's headquarters as collateral to obtain a loan for the construction of a training facility. The defendant then awarded many of the contracts for the construction project to friends and relatives at higher than normal prices. The defendant was charged and convicted of embezzling union property under 29 U.S.C. §501(c). On appeal, the defendant argued that the building was not property of a labor organization because the corporation owned it, not the union. *LaBarbara,* 129 F.3d at 85. The court found this argument frivolous, stating the defendant "clearly diverted assets -- the value of the building and therefore the value of the Building Corporation -- to himself in violation of Section 501(c)." *Id.* Thus, the union's ownership of the corporation stretches its interest to all the assets of that corporation and a theft or improper use of any asset constitutes a violation of 29 U.S.C. §501(c). *See also*

United States v. Briscoe, 65 F.3d 576, 586 (7th Cir. 1995) (holding union official's retention of loan application fees from non-members for personal use was sufficient to sustain a conviction under 29 U.S.C. §501(c)).

In the present case, the money in the misappropriated fund was derived from the paychecks of all the union employees. They intended this fund to be a trust fund managed by the union and used for charitable purposes. Union officials exclusively controlled the selection of charities and distribution of money from this account. The evidence revealed that union officials authorized and signed all checks from this account. The union maintained the records of the account's activity at its headquarters.

The fact the charity fund enjoys tax-exempt status under 26 U.S.C. §501(c)(3) does not render it a separate entity as Hartsel alleges. Corporations, as well as a community chest, fund, or foundation, can obtain tax-exempt status under this code provision if they engage in charitable or other specified activity. Therefore, we find the assets of the Jeep Charity Fund were the funds of a labor organization, and affirm the decision of the District Court on this Count.

III. *Recusal*

On appeal, Hartsel alleges that the District Court judge erred by not recusing himself and ordering a new trial. As a basis for recusal, Hartsel argues that the judge was improperly influenced and compromised by the fact that he was exposed to ex parte information as the presiding judge in Conrad's criminal case. Judge Potter presided over Conrad's plea and sentencing prior to Hartsel's bench trial. Thus,

under 28 U.S.C. §455,[5] Hartsel argues Judge Potter should have recused himself because his impartiality might reasonably be questioned and because he obtained personal knowledge of the disputed evidentiary facts of the case. Hartsel insists that recusal was warranted because the trial judge was not merely presiding over a subsequent jury trial of a co-defendant, but instead, served as the trier of fact.

We are of the opinion that Judge Potter did not err by not recusing himself under the facts of the present case. "[A] judge must recuse [himself] if a reasonable, objective person, knowing all of the circumstances, would have questioned the judge's impartiality." *Hughes v. United States,* 899 F.2d 1495, 1501 (6th Cir.), *cert. denied,* 498 U.S. 980 (1990). In *United States v. Sammons,* 918 F.2d 592 (6th Cir. 1990), we held that a judge who previously presided over a criminal trial and sentencing of the defendant was not required to recuse

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[5] 28 U.S.C. §455 reads:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

himself from a subsequent bench trial involving the same defendant. We stated that to justify recusal under 28 U.S.C. § 455, the prejudice or bias must be personal or extrajudicial.

> "Personal" bias is prejudice that emanates from some source other than participation in the proceedings or prior contact with related cases. Personal bias arises out of the judge's background and associations. The critical test is whether the alleged bias "stem[s] from an extrajudicial source and result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

Id. at 599 (quoting *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1251-52 (6th Cir. 1989)).

Hartsel fails to point to any specific facts Judge Potter obtained from presiding over Conrad's case which would raise a question about his impartiality. There is no evidence to show that the judge expressed a bias or prejudice against the Defendant or maintained some preconceived notion about his guilt prior to Hartsel's trial. Any information the judge learned about Hartsel or the events surrounding his criminal activities came from his judicial activities and not from extrajudicial sources. Therefore, Judge Potter was not required to recuse himself simply because he presided over a co-defendant's plea and sentencing.

Conclusion

For the foregoing reasons, the decision of the District Court is REVERSED in part, and AFFIRMED in part. This case shall be remanded for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION

[Filed January 23, 1998]

No. 3:97CR717

United States of America, *Plaintiff*	)
v.	)
Norman Hartsel, *Defendant*	)

ORDER

POTTER, J.:

The Court will first consider defendant's Rule 29 motion for acquittal. The Court noted earlier that as to Count 1 this determination rests on the sufficiency of the evidence.

As to Count 1, it is the argument of the defendant that, in order to obtain a conviction under 18 U.S.C. § 1341, the government must prove beyond a reasonable doubt, among other things, that to advance or carry out the scheme or artifice to defraud, the defendant used the mails or caused the

mails to be utilized. The Court concludes that the mailing of the Articles of Incorporation of Stamp Out Hunger and the mailing thereof does not satisfy the requirements of the statute.

The Court now turns to the matter of the mailing of the bank statements of Stamp Out Hunger to the defendant by Mid-American Bank. The defendant relies on the cases of United States v. Maze, 414 U.S. 395 (1974); and Kann v. United States, 323 U.S. 88 (1944), for the proposition that use of the mails and the bank statements were not in furtherance of any scheme. The recent case of United States v. Lack, 129 F.3d 403 (7th Cir. 1997), discusses in some detail the cases of Maze and Kann and distinguishes those cases from a case similar to the case sub judice. In Lack, the court referred to Schmuck v. United States, 489 U.S. 705 (1989). It stated that Schmuck emphasized that courts must consider the full scope of the scheme when determining the sufficiency of the mailing element. Lack, 129 F.3d at 407. It is to be noted in the cases of Maze and Kann that the mailings occurred after what the court referred to as a fruition of the scheme. This is not the situation in the case sub judice. The Court finds that the defendant needed the account with Mid-American Bank, to provide the device for which checks could be deposited from the Jeep charity fund and thereafter diverted through other checking accounts to carry out the scheme and artifice to defraud the Jeep Corporation UAW Local 12 Employees' Charity Fund. The Mid-American account was an essential part of the scheme, and the mailing of the bank statements was incident to that account and were thus in furtherance of the defendant's scheme. It also permitted the defendant to monitor the account and to withdraw the balances. As stated in Lack; 129 F.3d at 409:

"Thus, because the mailing of the bank statements was incident to the opening of that account, those mailings were 'in furtherance' of Mr. Lack's scheme." See also, United States v. Reed, 47 F.3d 288 (8th Cir. 1994). As to defendant's motion for judgment of acquittal on Count 1, the Court finds that said motion is not well taken.

The Court now turns to defendant's motion in regard to Count 2. Defendant argues that once the Jeep Charity Fund received a 501(c)(3) status, it was no longer a labor organization and, therefore, does not fall within the definition and meaning of Title 29 U.S.C. § 501(c). The Court finds that the evidence established that the fund was treated as a union fund. See for example, defendant's Exhibits 2, 3 and government's Exhibits 11A, 12A, 13A, 14A and 15A. Section 501(c) refers to "the monies, funds, securities, property or other assets of a labor organization." The Court finds that Local 12's charity fund is a fund of the Union and, as such, falls within the purview of 29 U.S.C. § 501(c). The Court therefore finds that defendant's motion for judgment of acquittal on Count 2 is not well taken.

The Court now comes to its general verdict. The Court finds that the evidence establishes beyond a reasonable doubt that defendant is guilty of a violation of Title 18 U.S.C. § 1341, as alleged in Count 1, and the Court finds the defendant guilty of Count 1. The Court further finds that the evidence establishes beyond a reasonable doubt that defendant is in violation of Title 29 U.S.C. § 501(c) and Title 18 U.S.C. § 2, as alleged in Count 2, and defendant is guilty of Count 2.

IT IS SO ORDERED

/s/_____
Sr. United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed May 6, 1998]

No. 3:97CR717

United States of America,
Plaintiff

v.

Norman C. Hartsel,
Defendant

MEMORANDUM AND ORDER

POTTER, J.:

This action is before the Court on defendant's motion for judgment of acquittal or, in the alternative, for a new trial and the government's opposition. Also before the Court is defendant's motion for a new trial upon newly discovered information. After a one-week bench trial, this Court found defendant guilty of Count 1, mail fraud in violation of 18 U.S.C. § 1341, and Count 2, aiding and abetting the embezzlement of the Jeep Employees' Charity Fund in violation of 29 U.S.C. § 501(c).

Defendant now moves for judgment of acquittal pursuant to Fed. R. Crim. P. 29(c). The Court first addresses defendant's argument with respect to Count 2. Section 501(c) seeks to punish persons who embezzle or otherwise wrongfully convert to their own use or the use of another, "moneys, funds, securities, properties, or other assets of a labor organization. . ." In his motion, defendant argues that Section 501(c) has no application to the offense alleged in the indictment since the Jeep Employees' Charity Fund is not itself a labor organization. As such, defendant contends he could not have aided and abetted a violation of Section 501(c). Defendant presented the same argument in his Rule 29(a) motion. In an order dated January 23, 1998, ruling on that motion, the Court found that Local 12's charity fund is a fund of the Union and, as such, falls within the purview of Section 501(c). In the instant motion, defendant states that he does not disagree with the Court's characterization of the fund as a "Union Fund." Moreover, there is no dispute, that the UAW Local 12 is a labor organization. Section 501(c) does not require that the fund be a labor organization but, rather, that it be a fund of a labor organization. Although defendant argued at the hearing that the evidence does not support a finding that the Jeep Employees' Charity Fund is a fund of a labor organization, the Court disagrees. Among other things, the evidence indicated that the charity fund was funded by union members and that the union had sole discretion in the disbursement of the funds to qualified charities. For these reasons and those stated at trial and in this Court's order dated January 23, 1998, defendant's argument is found not well taken.

With respect to Count 1, mail fraud, defendant first argues that the indictment was defective in that it did not

specify any state law which was violated by defendant. An indictment is constitutionally sufficient if, "first, it contains the elements of the offense charged and fairly informs a defendant of the charges against which he must defend, and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." United States v. Monus, 128 F.3d 376, 388 (6th Cir. 1997). In addition, an indictment is usually sufficient "if it states the offense using the words of the statute itself, as long as the statute fully and unambiguously states all the elements of the offense." Id. The indictment in this case tracks the language of the mail fraud statute, 18 U.S.C. § 1341. In addition, it alleges that the scheme to defraud involved defendant aiding and abetting Ronald Conrad "in the embezzlement, theft, abstraction, and conversion of contributions from the Jeep Employees' Charity Fund and intentionally and willfully embezzling and converting a portion of the funds of Stamp Out Hunger for his own use and the use of others." Indictment ¶2. Paragraph 3 of the Indictment sets forth the scheme to defraud with specificity. The Court finds that the indictment contains all of the elements of mail fraud and fairly informed defendant of the charges against him. In any event, pursuant to Fed. R. Crim. P. 12(b), defendant was required to raise any defenses and objections based on defects in the indictment prior to trial. His failure to do so constitutes waiver of the defense or objection. Fed. R. Crim. P. 12(f).

Next, defendant makes a factual argument that a scheme to defraud did not exist and that he had no intent to defraud. In support of his argument, defendant details his own interpretation of the evidence at trial. This Court, however, considered all of the evidence offered by both defendant and the government, in addition to the credibility of

the witnesses at trial, and finds no basis for disturbing defendant's conviction.

Finally, defendant raises the same issue as presented in his Rule 29(a) motion, that the mailing of the bank statements of Stamp Out Hunger to defendant by Mid-American Bank were insufficient to support a mail fraud conviction. However, mail fraud does not require that use of the mails be an essential element of the scheme to defraud, but, rather, that the mailing be "incident to an essential part of the scheme." Schmuck v. United States, 489 U.S. 705, 710-711 (1989). In its January 23, 1998 order, the Court found that "[t]he Mid-American account was an essential part of the scheme, and the mailing of the bank statements was incident to that account." In addition, the bank statements "permitted the defendant to monitor the account and to withdraw the balances." See United States v. Lack, 129 F.3d 403 (7th Cir. 1997); United States v. Reed, 47 F.3d 288 (8th Cir. 1994). As such, the Court found that the mailings were in furtherance of defendant's scheme to defraud. Having presented no new arguments, the Court finds no reason to disturb the January 23 order.

In his motion, defendant also moves for a new trial, arguing that this Court's rulings exhibit a passion or prejudice in favor of the government such that its analysis of the factual evidence was clouded. The Court finds no basis for this argument.

On May 4, 1998, defendant filed a second motion for a new trial based upon newly discovered information. Defendant contends that his waiver of his right to a trial by jury should be declared void since the undersigned judge

presided over the sentencing of Ronald Conrad, who testified as a government witness in the case sub judice, and reviewed Conrad's presentence report. In addition, defendant contends that he was denied a fair and impartial trial when the undersigned judge failed to reveal such "confidential information" prior to defendant's trial.

Federal Rule of Criminal Procedure 33 provides that a motion for a new trial based on any ground other than the ground of newly discovered evidence "shall be made within 7 days after verdict or finding of guilty. . . ." Although defendant's motion is captioned as being based upon newly discovered information, the Court finds that not to be the case. Defendant was well aware of Conrad's involvement as it was set forth in defendant's indictment. Defendant knew that had been sentenced and, thus, should have known that a presentence report would have been completed. Conrad testified at trial, and at no time did defendant request Conrad's presentence report. Because defendant's motion is not based upon newly discovered evidence, the Court finds that it is untimely.

Moreover, defendant has presented absolutely no evidence indicating that the Court received any information which tainted the Court and resulted in an unfair trial. Defendant bases his argument purely on unfounded speculation. Accordingly, the Court finds defendant's motion not well taken.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendant's motion for judgment of acquittal or, in the alternative, for a new trial be, and hereby is, DENIED; and it is

FURTHER ORDERED that defendant's post trial motion for new trial based on newly discovered information be, and hereby is, DENIED.

/s/_____
Sr. United States District Judge